In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 21

ARO MANUFACTURING CO., INC., ET AL.,
PETITIONERS,

v.

CONVERTIBLE TOP REPLACEMENT CO., INC.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REASONS FOR WITHHOLDING CONSENT TO THE FILING OF A BRIEF AMICUS CURIAE BY THE AMERICAN PATENT LAW ASSOCIATION

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Petitioners have refused the request of William H. Webb, Esq. to file a brief amicus curiae, purportedly on behalf of members of the American Patent Law Association, because the requirements of Rule 42(3) for filing such a brief have not been met. Rule 42(3) of this Court reads as follows:

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> When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may timely be presented to the court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

Neither the letter sent to us requesting consent, nor the motion, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties. While the motion states that the American Patent Law Association has approximately 2,200 members, it does not and cannot allege that the views in the amicus curiae brief represent the common interest of all or even most of these members as distinguished from the interest of those members who oppose petitioners' views. Since Rule 42(3) conditions the issuance of an order permitting a non-governmental interest to file an amicus curiae brief upon showing both an interest and the inadequacy of presentation of relevant law and fact issues by the parties, we believe there are no grounds for granting the motion.

There is no excuse for this failure to comply with Rule 42(3) because we expressly stated to Mr. Webb that he had no grounds for filing the present motion under Rule 42 in our letter of June 28, 1960 withholding consent. In this same letter we suggested that the association approach that party which its Board of Managers felt needed aid and help in the preparation of its brief.

In his letter of June 20, 1969 requesting our consent, Mr. Webb advanced as his sole reason for filing:

> The Government has strongly attacked the doctrine of contributory infringement. . . . [W]e feel that there is a considerable likelihood that the Supreme Court will make an important ruling with respect to this doctrine.

Mr. Webb also said:

> Our Association is not interested in intervening. Nor is it interested in arguing that either side should prevail because of the particular factual situation existing in this case.

We immediately recognized that the stated reason was insufficient under Rule 42(3). In addition, we suspected that he would represent that the APLA members were opposed to the position of petitioners, despite his statement to the contrary.

If we consented to the filing of a brief opposing our position, purportedly representing the interest of all APLA members, we would be in effect lending support to views against not only our interest, but also against what we believe to be the interest of the people of the United States. Moreover, we would be misleading this Court into believing that the views in the amicus curiae brief represent the interest of the overwhelming majority of APLA members when we know that many, if not most, members agree with our views.*

* Had the Board of Managers been really interested in learning the views of its members, it could have done so. Section 11 of Article XII of the Articles of Association of the APLA authorizes the Board to "ask for Association action at a special or stated meeting or by referendum vote" "[as] to policy matters upon which the Association has

Counsel for petitioners and his partner are members of the APLA. W. R. Hulbert, Esq., the master appointed by the District Court in its accounting order (R. 43), is also an APLA member. While we can't speak for Mr. Hulbert, we can say that counsel for petitioners and his partner do not support Mr. Webb's position of opposing the Government and petitioners.

In addition, H. P. Kenway, Esq., a member of the APLA Board of Managers, rendered a paid opinion to petitioners after the decision of the District Court solely on the issue of repair. In that opinion he stated that he thought replacing the worn fabric was a permissible repair and that the decision of the District Court should be reversed for that reason. Petitioners relied on that opinion in deciding to appeal the judgment of the District Court.

Mr. Kenway only recently told us that had the Government not entered as amicus curiae, the Board of Managers would not have voted to file an amicus curiae brief. We don't see how the Government's entry can bear on whether the parties will adequately present questions of law or fact relevant to the disposition of the case. The question for consideration under Rule 42(3) is whether these issues will be discussed adequately by the parties, not whether the leaders of a private organization of lawyers should be able to influence the outcome of the litigation by echoing the views of one of the parties. And when the leaders of that organization file a motion without regard to Rule 42(3) and act so as to place a serious question as to whether they obscure rather than expound the views of its members, we doubt that a brief endorsed by these leaders can be relied upon by the Court as an aid to resolving the import-

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not taken a position". None of these avenues was followed although certiorari was granted in February, an unsigned "Editorial Note" discussed the case in the March-April 1960 APLA Bulletin, and a national meeting of the APLA was held at the end of April where Association approval could have been but was not sought.

ant constitutional, statutory, economic and equitable issues presented for decision in this case.

Regardless of how other lawyers feel about the substantive issues in this case, we think that the overwhelming majority of lawyers would agree with us that it is at best unwise and probably improper for the leaders of an association of lawyers to use that association in support of views of one group of its members and oppose the views of a different group of its members by supporting one private litigant represented by an association member and opposing the private clients of another association member. By approving the filing of a brief supporting respondent, the Board of Managers and Mr. Webb have authorized using the dues of petitioners' counsel to oppose the latter's own clients.

We think that the remarks of Mr. Justice Frankfurter at the proceedings in his honor on April 30, 1960 in Cambridge concerning "the responsibility of the Bar, as inadequate advisers of amenable clients, for many . . . evils" are appropriate here. He said:

> Again and again I say to myself, and sometimes to a hospitable ear either to the left or right of me, "Why didn't this lawyer, in advising his client, consider beyond construction, whether it is right or wise?".

Respectfully submitted,

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